

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KMS TECH, INC., : Docket #20-cv-01041
Plaintiff, :
-against- :
G MISSION, INC., et al., : New York, New York
November 28, 2023
Defendants.

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PROCEEDINGS BEFORE
THE HONORABLE VALERIE FIGUEREDO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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INDEX

E X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
None				

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
None				

1 THE DEPUTY CLERK: KMS Tech, Inc. versus
2 G Mission, Inc., et al., Case Number 20-cv-1041.
3 The Honorable Valerie Figueredo presiding.

4 Counsels, can you please make your
5 appearances for the record, starting with
6 plaintiff's counsel.

7 MS. MELEKOU: Good morning. This is
8 Eleni Melekou -- go ahead.

9 MR. SHERMAN: Todd Sherman and
10 Eleni Melekou on behalf of the plaintiff. Thank
11 you.

12 MR. ROSS: Good morning, Your Honor. This
13 is Maurice Ross on behalf of the defendants and
14 counterclaim plaintiffs. And my associate,
15 Barack Bacharach will handle this hearing, he is on
16 the line with us.

17 MR. BACHARACH: Good morning, Your Honor.
18 This is Barack Bacharach.

19 THE COURT: Good morning, everyone. This
20 is Judge Figueredo.

21 So I gather the parties wanted to have a
22 conference to discuss potentially the scope of what
23 the joint expert was going to be addressing or the
24 discovery schedule. So I'm happy to have anyone who
25 wants to start off go ahead with what you'd like to

1 discuss.

2 MR. BACHARACH: Your Honor, this is
3 Barack Bacharach for the defendants.

4 So I think the parties wanted to discuss
5 the scope of two issues. As you mentioned
6 correctly, yes, we would like to discuss the scope
7 of the expert comparison. Now, I believe, since our
8 last status conference, it's plaintiff's expert.
9 It's no longer a joint expert. And secondly, we'd
10 like to discuss what costs plaintiff is to
11 compensate defendants for that were mooted by
12 plaintiff's late introduction of the deposit.

13 And, really, we're here because plaintiff's
14 counsel has just been not reasonable in pursuing
15 this action throughout this whole entirety, that's
16 why it's been delayed so long. And this is a
17 pattern that's continued. It's clear what the scope
18 of the expert comparison was to be. And plaintiff
19 presented -- and defendants generally offered
20 plaintiff to inspect their premises and come and
21 inspect the machine and have -- and provide the
22 expert with any passwords he might need to access
23 it. Plaintiff presented an unreasonable list of
24 demands, including a technical support person to
25 essentially do the expert's job for him, as well as

1 for defendants to cover the cost of shipping the
2 machine from their own premises to the expert's
3 office.

4 And on top of that, when defendants asked
5 plaintiff to re-compensate them for the reasonable
6 attorney's fees that were mooted by their late
7 instruction of the deposit, plaintiff only agreed to
8 pay \$1,400, less than 5 percent of the fees that
9 were incurred, and a facially ridiculous amount.

10 So it's been very hard because really the
11 demands that plaintiff is placing on defendants is
12 unreasonable. It's plaintiff's burden to prove this
13 case. It's plaintiff's burden for their expert --
14 to incur the cost of the expert. And plaintiffs
15 have to compensate defendants for the costs they
16 incurred that were mooted by their behavior. And
17 they just won't do it.

18 THE COURT: Sorry. Can we just take a step
19 back? Because I'm not entirely following. And,
20 again, correct me if my recollection is wrong. I
21 thought the issue of cost had to do with the cost of
22 briefing that portion of the summary judgment motion
23 that defendants had incurred prior to the reopening
24 of fact discovery.

25 MR. BACHARACH: Yes. And plaintiffs have

1 only agreed to compensate a minute -- a tiny amount
2 of those costs.

3 THE COURT: Okay. So that seems to me like
4 a separate issue from the expert.

5 MR. BACHARACH: Yes, it is a separate
6 issue.

7 THE COURT: Okay. So maybe we can just
8 take one issue at a time. Specifically, what's the
9 issue with regards to the expert?

10 MR. BACHARACH: The issue with regards to
11 the expert is, it was always our understanding -- it
12 was always defendant's understanding, and I believe
13 it was everyone's understanding, that the necessity
14 of this expert -- let's go back. Let's do the
15 timeline a little bit, right?

16 Plaintiffs sold defendants the software,
17 the PlayBox software in 2015, but they didn't
18 register the copyright until 2019. Moreover,
19 plaintiffs didn't keep records of their software.
20 And at deposition, the software engineer who
21 designed the software for plaintiffs admitted it was
22 updated multiple times, right?

23 So the fundamental issue with plaintiff's
24 case and why they want to introduce the certified
25 deposit was that plaintiff could not prove that they

1 sold defendants a copy of the software that was
2 copyrighted. And the reason they couldn't do it
3 with accessing the machine that they sold to
4 defendants is because they lost the record of what
5 they actually sold to defendants.

6 It was always our understanding that the
7 relevant expert comparison would be between the
8 certified deposit showing what was copyrighted, as
9 well as -- and compared that to the version of the
10 PlayBox that plaintiffs sold defendants. That is
11 what we offered plaintiff's expert to come and
12 inspect on our premises, is what our understanding
13 the comparison was to be. And instead, plaintiff
14 demanded access to every single copy of the software
15 that defendants may have made, including copies that
16 were put on other machines and modified in certain
17 ways, even though defendants have long admitted to
18 copying those. And, also, a bunch of other
19 unreasonable demands on defendants, like a dedicated
20 technical support person to essentially do the
21 expert's job for him.

22 So we're just kind of at an impasse as to
23 what the scope of this comparison should be and what
24 defendants --

25 THE COURT: So it sounds like, as I

1 understand it, there was the certified copy on
2 deposit 2019. There's the version of the PlayBox
3 software that was sold to you in 2015. And
4 defendants have since made copies of that software.

5 MR. BACHARACH: Yes, but I should say the
6 copies -- so it's important to understand this
7 for -- it's important to understand something about
8 the copies. The copies are not exactly direct
9 copies. Defendants always bought the PlayBox
10 software as a backup, and the reason they bought it
11 was because it had access to foreign language songs
12 that defendants otherwise didn't have. And it was
13 always going to be integrated with the defendant's
14 larger main system. It was a secondary system.

15 So defendants made some copies of the
16 software, but they made the copies to integrate it
17 with certain other machines. So in making those,
18 quote/unquote, copies, what they really did is, they
19 took certain elements of the PlayBox software and
20 they put it in other machines. And those elements
21 are discordant. They are not whole. They might --
22 probably don't match the certified deposit. And,
23 again, defendants have long admitted to making these
24 copies. So we just don't understand what
25 defendants -- or why plaintiffs want access to these

1 copies, what the point of the comparison is. We're
2 willing --

3 THE COURT: Let me just ask, the copies you
4 made would have been of the 2015 software.

5 MR. BACHARACH: Would have been of the --
6 yes.

7 THE COURT: So maybe I'm missing something.
8 But if they inspect the 2015 software, it sounds
9 like what you copied were pieces of that. So that's
10 what you would see in whatever other iteration you
11 might have this software in, but it would still
12 fundamentally be pieces of the 2015 software.

13 MR. BACHARACH: Yes.

14 THE COURT: Okay. I'm happy to hear from
15 anyone, Ms. Melekou or Mr. Sherman, on just this
16 issue of what the expert is going to be comparing or
17 evaluating.

18 MR. SHERMAN: Thank you, Your Honor. This
19 is Todd Sherman.

20 That was overly complicated. A lot of the,
21 quote/unquote, demands that were referenced are
22 really looted by meet and confers that occurred that
23 were not referenced. And they weren't demands.
24 They were issues that were thought to be needed to
25 make things more efficient. However, the real issue

1 is, what are the plaintiffs permitted to inspect?

2 What we want to do, and what our expert has
3 told us that is necessary, is to have him go to the
4 defendant's facility, examine the PlayBox that was
5 sold to the defendant and also examine the copies
6 that they admit they made, because the question is,
7 were these copies true copies? Are they infringing
8 or are they not infringing? That's ultimately the
9 legal question that will have to be answered.

10 They acknowledge copying. But then in the
11 explanation that was just provided to the Court,
12 there was a lot of characterizations that we don't
13 know to be accurate. And I'm not suggesting for a
14 second that counsel is misrepresenting anything.
15 I'm saying that his client may be; we don't know.
16 And there's an allegation of copyright infringement.
17 The expert needs to inspect the software to
18 determine whether or not it is, in fact, infringing.
19 And there's an expert analysis, a fact analysis.
20 There's a legal analysis. And what we've been told,
21 no -- and it's been a hard no -- to is, doing an
22 inspection of the copied software.

23 Now, Your Honor, as we review the
24 transcripts of the prior conferences/hearings, that
25 address this issue, authorized what is now the

1 plaintiff's expert to inspect the defendant's
2 software. And the defendant's software is the
3 copies. And we're not being given access to that.
4 And we don't believe it's an unreasonable request.

5 In terms of the technical support, I
6 believe that what that was really narrowed down to
7 was, if we need a password to get into the system,
8 please don't make us have to hack in. If there's a
9 password, just give it to us. And, of course, if
10 you want somebody there while our expert, who you
11 vetted and approved, is there doing their work, of
12 course you can observe them because it's your
13 facility. But all the other issues that were raised
14 in terms of technical support were mooted by
15 discussions that happened weeks ago, and they're no
16 longer an issue.

17 So the only issue right now is, can the
18 plaintiff please inspect the software that we
19 believe to have been infringed so that we can make
20 the proper analysis and come forth to the Court as
21 we need to. That's all we want to do with respect
22 to the software, is copy -- excuse me, is make
23 copies of, as is appropriate for the expert's use,
24 of course, of what's in the Play- -- inspect the
25 PlayBox, copy what's in the PlayBox, inspect the

1 copies, copies -- duplicate the copies, do whatever
2 inspection that a software expert does, and report
3 to us and the Court, as appropriate, what the
4 findings are. And we --

5 MR. BACHARACH: So --

6 MR. SHERMAN: -- all unreasonable.

7 MR. BACHARACH: I would just like to make a
8 very brief point in response.

9 So we also reviewed the transcript and it
10 very specifically said -- at least we believe the
11 Courts very specifically say the copy, singular,
12 that the expert could inspect, the copy, singular,
13 that plaintiffs sold to defendants.

14 Also, this is what -- I think there's the
15 fundamental disconnect here. We thought that it was
16 agreed upon that the fatal flaw in plaintiff's
17 infringement theory that the deposit was supposed to
18 correct was whether or not they initially sold
19 defendant's copyrighted software. Defendants have
20 long admitted to copying that software. Now, we say
21 it's with the license. However, if the software
22 that defendants -- that plaintiffs sold defendants
23 is indeed covered by deposit, there is no, sort of,
24 issue that then copying that, if it was a license,
25 would be infringed. That's not the legal issue, at

1 least as we see it, or we thought everyone saw it.

2 So we always thought that the relevant
3 comparison was between, again, what was sold to
4 defendants and the certified deposit. And I still
5 have yet to hear a rationale for why, since we've
6 admitted to copying it, plaintiff's expert needs to
7 inspect the copies, right? If they can prove that
8 the certified deposit covers what they sold, that's
9 the end of the infringement equally, correct?
10 Unless I'm mistaken.

11 MS. MELEKOU: Your Honor, Eleni Melekou
12 here.

13 Defendants have already admitted that they
14 copied, but this happened more than a year ago, and
15 here we are now again. And if we don't have access
16 to the copy of the defendant, we will find ourselves
17 in the same position, in the same place, in a few
18 months from now.

19 So what plaintiff has to prove is whether
20 the allegedly infringing software is similar to the
21 copyrighted software. And this is what the case law
22 show us, that the analysis and the comparison is
23 between the allegedly infringing software and the
24 copyrighted software. And, again, if we don't have
25 access to the copy, then in a few months from now,

1 let's say in February, once the expert discovery is
2 concluded, defendants might present an argument that
3 somehow the transfer of the software caused the
4 software to be different, so defendants used an
5 entirely different software. So we will find
6 ourselves in the same place as we are now.

7 MR. ROSS: Your Honor, this is
8 Maurice Ross.

9 The problem with this situation is it
10 ignores the history. The history of this matter is
11 that, after the deposition, an agreement was
12 reached. We admitted that copies were made of the
13 software; they were not exact copies. The copies
14 were manipulated so that they would stitch together
15 with other software. So the copies, we already know
16 they don't match the original software.

17 But putting that to the side, there was a
18 stipulation that no more discovery would be
19 necessary. And remember, what happened here is the
20 plaintiff delayed for months providing the deposit.
21 In fact, we made the summary judgment motion
22 because, at that time, they hadn't produced the
23 deposit. The Court allowed them to reopen discovery
24 for the limited purpose of allowing them to conduct
25 a comparison between the original software in the

1 PlayBox and the deposit. The Court never allowed
2 them to reopen discovery so they could go into our
3 offices and obtain copies of every copy that was
4 ever made. And the copies really don't exist as
5 pure copies. They were all stitched together. And
6 what they want to do is reopen discovery way beyond
7 what the Court contemplated and essentially require
8 us to give them all of the copies.

9 We acknowledge that all they need to do to
10 prove infringement is to prove that the original
11 software in the original PlayBox matches the deposit
12 and it's substantially similar to the deposit. Once
13 they prove that, then they prove an infringement.
14 And then the question simply is whether the
15 defendant had the right to make the copies pursuant
16 to the license. But for them to engage in this new
17 round of discovery and ask to see all, whatever,
18 20 copies were made and to inspect all of them, it's
19 way beyond the scope of anything that the Court
20 contemplated. It really complicates this matter.

21 This should be very simple. The only
22 comparison that is necessary to prove infringement
23 is between the software in the original PlayBox and
24 the deposit. Nothing more is required to prove
25 infringement. We admit that we made copies. We say

1 we had the right to make the copies.

2 And understand, defendant's counsel
3 agreed -- there was a stipulation long ago that,
4 because defendant agreed that we made copies, the
5 only remaining issue was whether the original
6 software matched the deposit. That's the problem
7 here. And what they're trying to do is just reopen
8 discovery full-fledged. We think it's improper.

9 THE COURT: Can I just ask a question?
10 Because it sounds together -- at various points,
11 people have said defendants made copies. But then
12 at other times, it seems like it's not actually a
13 copy. It's something that was, and I'm quoting, I
14 thought someone said stitched together with other
15 software. So it sounds --

16 MR. ROSS: That's right. And that's a very
17 key point, Your Honor. This is Maurice -- that's a
18 very key point.

19 You have to understand the concept here was
20 to use the software in the PlayBox, but it had to be
21 combined to fit in our other system. The PlayBox
22 was not the major system used in the facility.
23 There was another system that is the main system,
24 and it had its own software. But the PlayBox
25 software integrated certain access to foreign songs.

1 So what would happen is, the two softwares
2 would essentially be manipulated and stitched
3 together. So the copies that exist are not -- they
4 will have pieces of the PlayBox software, but
5 they've been manipulated to the point where it may
6 be misleading to conduct a comparison. The only
7 real solid, clear comparison is between the original
8 software and the deposit.

9 THE COURT: And when was the
10 stitched-together software put together?

11 MR. ROSS: Well, over the years. I mean,
12 see, understand -- what happened here is, PlayBox
13 was purchased for the purpose of having access to
14 these foreign songs that were not available in the
15 preexisting system. So what would happen is, the
16 client would take the software from the PlayBox and
17 integrate it into other computer systems. And in
18 order to do that, you take that software and it
19 becomes integrated or stitched into the system with
20 other software. I have no doubt that portions of
21 the software in the copies may map the deposit.
22 They may. But it's going to be very complicated to
23 compare those copies with the deposit, and it's
24 going to create all kinds of complicated, different
25 issues on the issue of infringement.

1 The infringement issue should be very
2 straightforward. If the deposit matches the
3 original software in the original PlayBox, then
4 we've stipulated that the copies infringe. We're
5 not disputing that, okay? So it's a red herring to
6 say they need to get into all the copies. Our
7 position on the copies has simply been we were
8 entitled to make them. It was part of the license
9 agreement that we received. But we're not disputing
10 that the copies infringe. And, therefore, the only
11 necessary comparison is between the original
12 software and the deposit.

13 THE COURT: And I'm just thinking through
14 this out loud, but why aren't they able to argue
15 that potentially the copies infringe what's
16 registered in 2019? Because your admission is that
17 it would have infringed whatever software was sold
18 to you in 2015. But it sounds like, potentially,
19 they could make a different argument as to
20 infringement.

21 MR. BACHARACH: Well, Your Honor, that, in
22 our mind, would be the point of -- sorry. This is
23 Barack Bacharach for defendants.

24 Your Honor, that would be the point of
25 comparing the software that plaintiffs sold to

1 defendant in 2015 with the certified deposit. That
2 is the link that would establish infringement, if
3 you will. Because if the software that plaintiff
4 sold defendants in 2015 is covered by the deposit,
5 if that is indeed copyrighted, then defendants have
6 long admitted that the --

7 THE COURT: I think my question is slightly
8 different, right? It sounds like you made these
9 copies over time. So maybe the 2019 registered
10 copyrighted version of the software doesn't match
11 what was given to you in 2015.

12 But why don't they have a separate argument
13 that the copies that you made between 2015 and later
14 could potentially infringe what was registered in
15 2019?

16 MR. BACHARACH: Because those copies would
17 be pieces of what was sold to defendants in 2015.
18 So it's the same. Those copies would be more far
19 removed from -- if the software that was sold -- if
20 the software that was sold to defendants in 2015
21 doesn't match up with the copy in 2019, then ipso
22 facto copies that are more far removed from that
23 software and even less similar to what was
24 registered are infringing, right? Those copies are
25 still pieces of what was sold to defendants in 2015.

1 MR. SHERMAN: Your Honor, most
2 respectfully -- this is Todd Sherman on behalf of
3 the plaintiff.

4 We're hearing a lot of what appears to be
5 factual contentions that have never been
6 established. So that is one of the main reasons why
7 we need to inspect these copies because we're being
8 told there's a copy. There's a copy. Part of it's
9 a copy. There's a connection to a copy. But what
10 really is it? And without having the opportunity
11 for our expert, who, again, they vetted and
12 approved, inspect the software, we're at a loss.

13 And this isn't reopening discovery. It's
14 an issue that's been open and being addressed since
15 the introduction of the certified deposit. So
16 nothing that we're requesting is unreasonable or out
17 of the ordinary for a copyright infringement case.
18 We're not hearing a stipulation that each and every
19 one of our copies is an infringement. "There is no
20 need for you to inspect because we admit infringing
21 your software." We're not hearing that. We hear
22 that there's a copy, and then we're hearing that
23 there's fragments, pieces, or things that are tied
24 together.

25 Now, if this is all, in fact, true, it may

1 very well be an infringement. I am very confident
2 that there will be an argument to the contrary. And
3 that's why we needed an inspection and an analysis
4 to be able to come forward and also to confront any
5 such argument. And, again, this isn't like we're
6 trying to go and publish their information to the
7 entire free world. We're looking to inspect and
8 analyze for the purpose of this litigation. So
9 there really should be no -- this shouldn't even be
10 an issue. There's a copy; we're alleging that it
11 was improperly made. They're alleging that it
12 wasn't. They're alleging that we're contending that
13 there's no infringement; we're contending that there
14 is. The evidence of the infringement is the copies
15 in addition to -- there's a chain. There's what was
16 created, what was sold, what was copied, and how it
17 was used. And all of those things are elements of
18 the infringement claim. And it's not unreasonable
19 for the plaintiff to want to conduct the inspection
20 that we've requested and we believe was already
21 authorized. It's that disagreement that brings us
22 before you today.

23 MR. ROSS: Your Honor, this is
24 Maurice Ross.

25 Very respectfully -- very respectfully,

1 Counsel makes reasonable points, except for one
2 problem -- two problems. We're not dealing with
3 this problem in a vacuum. This case goes back to
4 2019. What they're trying to do now is something
5 that they could have done years ago. But, at one
6 point, there was an agreement they didn't need to
7 see the copies. We admitted that if the original
8 software that they provide to us infringes, the
9 copies infringe, okay?

10 Now, they say they have to look at the
11 copies. I don't know how it could be more clear.
12 We will admit that, if the original software in the
13 PlayBox infringes, matches the deposit, the copies
14 are infringing. Now, we believe we have the right
15 to infringe. But you see, the problem here is
16 also --

17 THE COURT: This is, I guess, what I'm not
18 following is why -- it sounds like you would admit
19 that the copies infringe if the original software
20 infringes. And I was asking earlier, why can't they
21 say -- or why can't they make an argument that even
22 if the original software doesn't infringe, the
23 copies themselves could infringe?

24 MR. ROSS: Because, Your Honor, they're not
25 real copies, first of all. They're going to be

1 stitched together with other software. It's a
2 problem; they could make that argument. The
3 copies -- we're not going to have magically -- if
4 the original software didn't infringe, we're not
5 going to somehow create on our own copies that
6 magically infringe. I mean, that's just not
7 realistic.

8 THE COURT: No, but there's other ways to
9 infringe the copyright that's not a literal copy if
10 it's substantially similar.

11 MR. ROSS: Well, I understand that,
12 Your Honor, but this is just -- would be allowing
13 them to reopen discovery. They stipulated years ago
14 that they didn't need this discovery. And the
15 disruptions in my client's business, if we have to
16 give them access to all of these copies, is
17 substantial, and we're at a point where this is just
18 not fair. It's unreasonable.

19 Frankly, the Court should never have given
20 them the opportunity, after they missed many
21 deadlines, to even conduct this comparison. It was
22 very generous of the Court to allow them to reopen
23 discovery to conduct this very limited comparison
24 between the original software. And to allow them to
25 now reopen this whole mess, I think it's

1 fundamentally unfair to my client.

2 THE COURT: So, Mr. Ross, two things. One
3 is how many copies are we talking about? Because
4 you're making this argument that there's a burden,
5 but there's no specifics being provided.

6 MR. ROSS: I don't know the exact number,
7 but they had 18 rooms and they used the PlayBox in
8 many of the rooms. So you can presume it's 6 feet
9 or 8 feet. There's a number of copies.

10 And we're admitting that we copied it, that
11 we copied -- that we used elements of their
12 software.

13 THE COURT: And then just one more
14 question. You had said earlier that they had
15 stipulated or that there had been some agreement
16 that led defendants to stipulate to the copying.

17 Is that somewhere on the docket?

18 MR. ROSS: No, Your Honor. That was an
19 agreement that occurred with Gregory Nahas and
20 myself after the depositions, wherein their
21 witnesses admitted that they had updated the
22 software on multiple occasions and so forth. And we
23 admitted that we made copies and that the copies --
24 that if the original software matches the
25 copyrighted deposit, that those copies infringe.

1 And I'll admit that on the record today.

2 MR. BACHARACH: I believe it's memorialized
3 in the emails as well.

4 MR. SHERMAN: Your Honor, this is
5 Todd Sherman.

6 A look at the record doesn't reveal any
7 such a stipulation. What it does show is that,
8 during the deposition testimony, I believe, of a
9 representative of the defendants, that there was an
10 interjection by Mr. Ross where he asserted that the
11 software was copied. I don't even believe it's
12 testimony from the defendant himself. I'm not sure
13 if it was because of a language barrier because I do
14 believe that the deposition may have been conducted
15 in a foreign language. I'm not 100 percent sure.
16 My recollection isn't that clear.

17 But it is my recollection that Mr. Ross had
18 interjected that it was copied. We admit it was
19 copied. But that's not a stipulation, and it's
20 certainly not an agreement to not investigate or not
21 assess.

22 And, again, now we're hearing that there is
23 all these different uses of our client's software
24 and there's mentions of a license agreement that we
25 also don't agree is in the record or exists with

1 these vast terms. So there's a lot of factual
2 issues that are being argued now by defendant's
3 counsel that go very well to the heart of why
4 inspecting the copies, whether in whole or in part,
5 because it seems like there was manipulation done to
6 our client's software, which itself may be an
7 infringement that we're being blocked or attempted
8 to be blocked from seeing.

9 And our request, again, we just
10 respectfully submit that it's not unreasonable to
11 want to see the software that we allege to have been
12 infringing.

13 THE COURT: Okay. And I know the
14 parties -- I don't want to run out of time, but I
15 know the parties have said there was a second issue
16 that they want to discuss.

17 MR. SHERMAN: Yes, Your Honor. This is
18 Todd Sherman again, for the record.

19 It goes to the amount of compensable costs
20 associated with the drafting of the defendant's
21 summary judgment motion because a particular issue
22 was, in fact, mooted by the Court's acceptance of
23 the certified deposit that was, in fact, filed late.
24 And we acknowledge that.

25 And during the last hearing before

1 Your Honor, we addressed the Rule 16 authority of
2 the Court, and we acknowledged that the Court had
3 discretion, and what it did in exercise of that
4 discretion was assess costs on the limited issue to
5 the plaintiff. And we acknowledged that. And I
6 believe that resolved our motion for
7 reconsideration. And I think that that's what the
8 whole point of that conference was.

9 There's a dispute as to what the costs
10 associated with that motion and that particular
11 prong of the motion are compensable. And we did, in
12 fact, receive invoices from defendant's counsel.
13 Ultimately, they were unredacted, not getting into
14 details, because we agreed to keep it attorney's
15 eyes. And so I know that this record itself is
16 public. So I'm not going into any detail for that.
17 But we disagree as to -- solely, of course, on the
18 invoice. A hearing could expand on it. But based
19 upon the invoice, of the entries on the invoice, we
20 disagree that a vast majority of what is being
21 attributed -- distinct portion of a motion -- and
22 the directive Your Honor had ordered because we
23 disagree that this vast array of costs would be
24 associated with -- again, on the face of the trans-
25 -- and yes, we did discuss this at length with both

1 Mr. Ross and Mr. Bacharach. We had extensive
2 discussions in meet and confer sessions, trying to
3 nail it out. And, unfortunately, it's a very
4 fact-specific inquiry.

5 And on the papers below of just the
6 invoices, we cannot come to an agreement. Yes, the
7 number that we propose, based upon a review, I
8 believe -- and this is just based upon notes that I
9 had taken several weeks or months ago -- was \$1,140.
10 I know that the defendants disagree. I'm not saying
11 that to be offensive. I'm saying it to just be
12 clear to Your Honor, that that's what we computed
13 based upon our view of the invoices. And it wasn't
14 in an attempt to do anything but interpret what we
15 were seeing and come up with a number that we
16 believed was taking the invoices at face value, not
17 questioning the veracity of anything. These dollar
18 figures appear to be associated fairly with that
19 particular argument and briefing that particular
20 argument, and that's where that number came from.

21 MR. BACHARACH: Your Honor, I fundamentally
22 dispute what Mr. Sherman said. Sorry. This is
23 Barack Bacharach for defendants.

24 So I can get into a little bit more factual
25 detail than what Mr. Sherman mentioned. Defendants

1 incurred about \$40,000 in expenses preparing this
2 motion. Defendants requested only half, \$20,000.
3 And we thought that was eminently reasonable and, in
4 fact, fair because the majority of this work was
5 spent on the issue of the lack of the deposit,
6 right?

7 The other issue, the fact that plaintiffs
8 sold defendants software for music that they
9 evidently did not have licenses to, is a discrete
10 and simple legal issue. It required no factual
11 background. It required very little factual
12 background. It required very little research on
13 case law. It's a simple matter of applying the
14 doctrine of unclean hands and copyright to misuse.

15 Now, the other issue, the fact that
16 plaintiff instituted this action without any records
17 of their own software or the copyrighted deposit
18 itself, that is a very factually detailed issue and
19 also a legally, sort of, far-out-there issue, right?
20 It's not very often that you find cases that
21 requires a lot of the development of case and that
22 requires a lot of review of case law. It requires a
23 development of a law of factual background.

24 And plaintiff took the position that only
25 one quarter of the time spent drafting the brief was

1 compensable. They took the position that not only
2 was not the legal research required for making the
3 argument about the certified deposit, the factual
4 background -- long, detailed factual background
5 required, all the time spent reviewing the documents
6 to figure out what happened, why this delay
7 happened, what their misconduct was. Not only is
8 that not compensable, plaintiffs took a position
9 that the actual drafting of the factual background
10 that explains this whole long pattern of delay and
11 refusal to provide the deposit, they took position
12 that that itself was not compensable, even though
13 defendants only asked for half of those costs,
14 right?

15 We could have asked for all that, in
16 fairness, because that had nothing to do with the
17 fact that, in 2015, they sold our client software
18 for music they didn't have a license to. We could
19 have asked for all the cost of that; we only asked
20 for half. And they still took the position that
21 none of that was compensable. So I really dispute
22 that this was a good faith effort to look at bills
23 and to figure out what was --

24 MR. SHERMAN: Your Honor, again, this is
25 Todd Sherman.

1 I apologize. But Your Honor directed that
2 the costs that were compensable were solely
3 associated with drafting the particular argument of
4 their brief that dealt with the delay in filing the
5 certified deposit. The other arguments are wholly
6 unrelated. And so those costs could never have been
7 compensable under Your Honor --

8 MR. BACHARACH: So --

9 MR. SHERMAN: -- and the factual
10 background, to the extent that it's a statement of
11 facts in a brief, they would have had to do a
12 statement of wealth. They could have elected to do
13 a statement of facts in any summary judgment brief.
14 The odds on the defendants, in this particular case,
15 not renewing a motion for summary judgment, because
16 I believe they were granted leave to at the end of
17 this expert assessment, is very low. There's no
18 doubt that they will, in fact, bring about that
19 motion and use the very same statement of fact as
20 they did in whatever other prior arguments that
21 they've already briefed.

22 So we look to what was fairly attributable
23 based on the invoices to this particular discrete
24 argument. And while Counsel may disagree, it was a
25 good faith effort on our part to parse out what is

1 totally related to that particular issue. And,
2 again, while there's a lot of adjectives being used,
3 this was four pages of the brief, not --

4 MR. BACHARACH: Respectfully, the Court
5 said that it was --

6 MR. SHERMAN: Sir, sir, sir --

7 MR. BACHARACH: Sorry. I thought you were
8 done.

9 THE COURT: I'm just going to interject a
10 minute --

11 MR. SHERMAN: For expediency, I'm done,
12 Your Honor. Thank you very much.

13 THE COURT: Yeah, no worries. I'd have to
14 see briefing on this. I'm not going to be able to
15 resolve this on this call.

16 So on the attorney's fees issue, defendants
17 can file a motion. I'm happy to give you a briefing
18 schedule on that. I don't think -- you can make it
19 a full-blown motion if you think it's necessary.
20 You could do a letter motion, something shorter.
21 I'd leave that up to you. If the parties want to
22 work out a briefing schedule, that's also fine. If
23 not, I can set one now.

24 MR. SHERMAN: On behalf of the plaintiff,
25 we're more than happy to speak with the defendants

1 about what works in terms of a briefing schedule and
2 report to Your Honor, if that's acceptable. On the
3 other hand, if they prefer that Your Honor set it,
4 then we understand that as well. But we're happy to
5 speak with them and work something out that's
6 amenable to everyone if that's acceptable to the
7 Court.

8 THE COURT: Yeah. I mean, I think it's
9 generally best for the parties to work out a
10 schedule that works for them, and I'm happy to memo
11 endorse it.

12 Mr. Ross, did you want to say something?

13 MR. ROSS: Yeah. Given the difficulties in
14 working with plaintiff's counsel, I normally would
15 agree with that, but -- well, why don't we try it.
16 If we can't work out a briefing schedule, we'll
17 report to the Court.

18 THE COURT: Okay. Why don't you give it a
19 shot. Again, I'm fairly flexible here, so you could
20 take as much time as you need. And this is
21 definitely something that would require briefing.

22 On the other issue, I think I've definitely
23 heard from everyone. I just want to look back at
24 the docket for a few things. I will issue an order
25 relatively quickly addressing the expert discovery

1 issue. I just want to ask one more question on
2 that.

3 I don't recall what happened or if we ever
4 addressed this at the last hearing. But on the
5 joint expert, is that a cost that's borne only by
6 plaintiff?

7 MR. SHERMAN: Your Honor, the expert is no
8 longer joint. It was determined that it would be
9 plaintiff's expert. Very same person that was
10 vetted. And yes, it's a plaintiff's-only cost.

11 THE COURT: Okay.

12 MR. ROSS: Your Honor, both of these
13 issues, to me, I mean, fundamentally, there's a
14 whole history here, and plaintiffs are attempting to
15 simply pretend that the case is starting from
16 scratch. And I just think both on this attorney's
17 fee issue, and they really -- they're part of the
18 same problem, which is that defendants have been
19 caught up into this litigation for years. It's as
20 if the plaintiffs are trying to start from scratch
21 and take no responsibility for their delays. And
22 it's very frustrating and unfair to my client.

23 MR. SHERMAN: Your Honor, on behalf of the
24 plaintiff -- and, again, this is Todd Sherman -- if
25 the defendants would have just given us the access

1 we asked for, this hearing, if anything, would have
2 been reporting to you what our expert found. So any
3 delay now is certainly not the plaintiff.

4 We're trying to get access just so we can
5 do what we need to do. The fact that we're being
6 thwarted is why we're here. So we would like to
7 move forward expeditiously. We would like to have
8 had our expert in there making the assessment that
9 we believe to be necessary, so that way we could
10 move forward. And we were told no, and that's why
11 we're here.

12 THE COURT: All right. So then, again,
13 I'll give you a decision on that relatively quickly.

14 On the attorney's fees issue, if the
15 parties want to decide exactly how robust the
16 briefing you want to make and the time period. If
17 you can't reach an agreement, just send me a letter,
18 and I can give you a schedule.

19 MR. SHERMAN: Thank you very much,
20 Your Honor. It's most appreciated.

21 MR. BACHARACH: Thank you, Your Honor.

22 MR. ROSS: Thank you, Your Honor.

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C E R T I F I C A T E

I, Marissa Mignano, certify that the foregoing transcript of proceedings in the case of KMS TECH, INC. v. G MISSION INC, ET AL, Docket #1:20-cv-01041-GBD-VF, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Marissa Mignano
Marissa Mignano

Date: December 12, 2023